



Priority ☒  
Send ☒  
Enter ☒  
Closed ☐  
JS-5/JS-6 ☐  
JS-2/JS-3 ☐  
Scan Only ☐

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

11	HENRY DAVIDIAN,	) NO. CV 06-7801-CAS (E)
12	Plaintiff,	)
13	v.	) ORDER ADOPTING FINDINGS,
14	JO ANNE B. BARNHART, COMMISSIONER	) CONCLUSIONS AND RECOMMENDATIONS
15	OF SOCIAL SECURITY ADMINISTRATION,	) OF UNITED STATES MAGISTRATE JUDGE
16	Defendant.	)

Pursuant to 28 U.S.C. section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein along with the attached Report and Recommendation of United States Magistrate Judge.

IT IS ORDERED that: (1) the Report and Recommendation is approved and adopted as the Findings of Fact and Conclusions of Law herein; (2) Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment are denied; and (3) the matter is remanded to the Commissioner of Social Security Administration for further administrative action.

///

THIS CONSTITUTES NOTICE OF ENTRY  
AS REQUIRED BY FRCP, RULE 77(c)

1 IT IS FURTHER ORDERED that the Clerk shall serve forthwith a  
2 copy of this Order, the Magistrate Judge's Report and Recommendation  
3 and the Judgment by United States mail on the Plaintiff, counsel for  
4 Plaintiff and on the United States Attorney for the Central District  
5 of California.

6  
7 DATED: July 27, 2007.  
8

9  
10 Christina A. Snyder  
11 CHRISTINA A. SNYDER  
12 UNITED STATES DISTRICT JUDGE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 HENRY DAVIDIAN, ) NO. CV 06-7801-CAS(E)  
12 Plaintiff, )  
13 v. ) REPORT AND RECOMMENDATION OF  
14 JO ANNE B. BARNHART, COMMISSIONER ) UNITED STATES MAGISTRATE JUDGE  
15 OF SOCIAL SECURITY ADMINISTRATION, )  
16 Defendant. )  
17

18 This Report and Recommendation is submitted to the Honorable  
19 Christina A. Snyder, United States District Judge, pursuant to 28  
20 U.S.C. § 636 and General Order 05-07 of the United States District  
21 Court for the Central District of California.  
22

23 PROCEEDINGS  
24

25 Plaintiff filed a complaint on December 8, 2006, seeking  
26 review of the Commissioner's denial of disability benefits.  
27 Plaintiff filed a motion for summary judgment on May 31, 2007.  
28 Defendant filed a motion for summary judgment on July 2, 2007. The

1 Court has taken both motions under submission without oral argument.  
2 See L.R. 7-15; "Order," filed December 11, 2006.  
3

4 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**  
5

6 Plaintiff, a former physician, asserts disability since  
7 August 1, 1999, based primarily on fatigue allegedly resulting from  
8 Lyme disease (Administrative Record ("A.R.") 60-62, 288-90).  
9 Plaintiff testified to fatigue of disabling severity (A.R. 288-90).  
10 Plaintiff's treating internist, Dr. Pitchon, opined Plaintiff is  
11 totally disabled (A.R. 259-61).  
12

13 The Administrative Law Judge ("ALJ") stated that Plaintiff  
14 "appears sincere with respect to his testimony on subjective  
15 matters," but ultimately found such testimony "not entirely credible  
16 . . ." (A.R. 19, 21). The ALJ rejected Dr. Pitchon's opinion as  
17 allegedly insufficiently supported (A.R. 20). The ALJ apparently did  
18 not attempt to recontact Dr. Pitchon for a clarification of the bases  
19 for Dr. Pitchon's opinion.  
20

21 The ALJ denied benefits (A.R. 18-22). The Appeals Council  
22 denied review (A.R. 4-6).  
23

24 **STANDARD OF REVIEW**  
25

26 Under 42 U.S.C. section 405(g), this Court reviews the  
27 Commissioner's decision to determine if: (1) the Commissioner's  
28 findings are supported by substantial evidence; and (2) the

1 Commissioner used proper legal standards. See Swanson v. Secretary,  
2 763 F.2d 1061, 1064 (9th Cir. 1985).

3  
4 **DISCUSSION**

5  
6 For the reasons discussed below, the Court should remand this  
7 matter for further administrative proceedings pursuant to sentence  
8 four of 42 U.S.C. section 405(g).

9  
10 The ALJ erred in connection with the evaluation of Plaintiff's  
11 credibility. When an ALJ determines that a claimant's testimony  
12 regarding subjective symptoms is not credible, the ALJ must make  
13 "specific, cogent" findings, supported in the record, to justify the  
14 ALJ's determination. See Lester v. Chater, 81 F.3d 821, 834 (9th  
15 Cir. 1996); Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990);  
16 Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988).<sup>1</sup>

17  
18 In the present case, the body of the ALJ's decision appears to  
19 have rejected Plaintiff's credibility merely because "the disabling  
20 nature of the impairment does not appear to be fully supported by  
21 objective findings and treatment records" (A.R. 19). An alleged  
22 inconsistency between a claimant's testimony regarding subjective  
23

---

24 <sup>1</sup> In the absence of evidence of "malingering," many Ninth  
25 Circuit cases have applied the arguably more rigorous "clear and  
26 convincing" standard. See Connett v. Barnhart, 340 F.3d 871, 873  
27 (9th Cir. 2003); Ballard v. Apfel, 2000 WL 1899797 \*2 n.1 (C.D.  
28 Cal. Dec. 19, 2000) (collecting cases). In the present case, the  
ALJ's findings do not pass muster under either the "specific,  
cogent" standard or the "clear and convincing" standard, so any  
distinction between the two standards is academic.

1 | symptomatology and the objective medical record is a legally  
2 | insufficient basis for rejecting a claimant's credibility. See  
3 | Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988) (ALJ may not  
4 | discredit excess symptom testimony "solely on the ground that it is  
5 | not fully corroborated by objective medical evidence"). The  
6 | "findings" section of the ALJ's opinion refers to "the degree of  
7 | medical treatment required, discrepancies between the claimant's  
8 | assertions and information contained in the documentary reports, the  
9 | reports of the treating and examining practitioners, and the medical  
10 | history" (A.R. 21). These vague, generalized references add little  
11 | or nothing to the body of the ALJ's decision. The ALJ thus failed to  
12 | discharge the ALJ's obligation to make "specific, cogent" findings,  
13 | supported in the record, to justify the ALJ's credibility  
14 | determination.

15 |  
16 | The ALJ also erred in connection with the evaluation of  
17 | Dr. Pitchon's opinion. A treating physician's opinion "must be given  
18 | substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.  
19 | 1988); see Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989)  
20 | ("the ALJ must give sufficient weight to the subjective aspects of a  
21 | doctor's opinion . . . This is especially true when the opinion is  
22 | that of a treating physician") (citation omitted). Even where the  
23 | treating physician's opinion is contradicted,<sup>2</sup> "if the ALJ wishes to  
24 | disregard the opinion of the treating physician he . . . must make  
25 | findings setting forth specific, legitimate reasons for doing so that  
26 |

27 | <sup>2</sup> Rejection of an uncontradicted opinion of a treating  
28 | physician requires a statement of "clear and convincing" reasons.  
Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.  
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 are based on substantial evidence in the record." Winans v. Bowen,  
2 853 F.2d 643, 647 (9th Cir. 1987) (citation, quotations and brackets  
3 omitted); see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may  
4 disregard the treating physician's opinion, but only by setting forth  
5 specific, legitimate reasons for doing so, and this decision must  
6 itself be based on substantial evidence") (citation and quotations  
7 omitted); McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989)  
8 ("broad and vague" reasons for rejecting the treating physician's  
9 opinions do not suffice).<sup>3</sup>

10  
11 Section 404.1512(e) of 20 C.F.R. provides that the  
12 Administration "will seek additional evidence or clarification from  
13 your medical source when the report from your medical source contains  
14 a conflict or ambiguity that must be resolved, the report does not  
15 contain all of the necessary information, or does not appear to be  
16 based on medically acceptable clinical and laboratory diagnostic  
17 techniques." See Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.  
18 1996) ("If the ALJ thought he needed to know the basis of Dr.  
19 Hoeflich's opinions in order to evaluate them, he had a duty to  
20 conduct an appropriate inquiry, for example, by subpoenaing the  
21 physicians or submitting further questions to them. He could also

22  
23 <sup>3</sup> Contrary to Defendant's apparent argument, the mere  
24 contradiction of a treating physician's opinion by consultative  
25 physicians does not satisfy the requirement of stating specific,  
26 legitimate reasons for rejecting a treating physician's opinion.  
27 Subsequent to the decision cited by Defendant (Andrews v. Shalala,  
28 53 F.3d 1035 (9th Cir. 1995)), the Ninth Circuit has reiterated  
that the Administration always must state specific, legitimate  
reasons for rejecting the contradicted opinions of treating  
physicians. See, e.g., Lester v. Chater, 81 F.3d 821, 830-31 (9th  
Cir. 1995) (reading Andrews more narrowly than Defendant apparently  
urges).

1 have continued the hearing to augment the record") (citations  
2 omitted); see also Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.  
3 1983) ("the ALJ has a special duty to fully and fairly develop the  
4 record and to assure that the claimant's interests are considered").  
5 In the present case, the ALJ erred by rejecting Dr. Pitchon's opinion  
6 as allegedly unsupported without first attempting to recontact  
7 Dr. Pitchon regarding the bases for the opinion. Id.

8  
9 Remand, rather than reversal, is appropriate in the present  
10 case. When a court reverses an administrative determination, "the  
11 proper course, except in rare circumstances, is to remand to the  
12 agency for additional investigation or explanation." INS v. Ventura,  
13 537 U.S. 12, 16 (2002) (citations and quotations omitted). Remand is  
14 proper where, as here, additional administrative proceedings could  
15 remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d  
16 599, 603 (9th Cir. 1989); see generally Kail v. Heckler, 722 F.2d  
17 1496, 1497 (9th Cir. 1984); see also Connett v. Barnhart, 340 F.3d  
18 871, 876 (9th Cir. 2003) (remand is an option where the ALJ stated  
19 invalid reasons for rejecting a claimant's excess pain testimony).<sup>4</sup>

20  
21 The Ninth Circuit's decision in Harman v. Apfel, 211 F.3d 1172  
22 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) ("Harman") does not  
23 compel a reversal rather than a remand of the present case. In  
24 Harman, the Ninth Circuit stated that improperly rejected medical  
25 opinion evidence should be credited and an immediate award of  
26

---

27 <sup>4</sup> The Court has not reached any of the other issues raised  
28 by Plaintiff, except insofar as to determine that Plaintiff's  
arguments in favor of reversal rather than remand are unpersuasive.



1 | benefits directed where "(1) the ALJ has failed to provide legally  
2 | sufficient reasons for rejecting such evidence, (2) there are no  
3 | outstanding issues that must be resolved before a determination of  
4 | disability can be made, and (3) it is clear from the record that the  
5 | ALJ would be required to find the claimant disabled were such  
6 | evidence credited." Harman at 1178 (citations and quotations  
7 | omitted). Assuming, arguendo, the Harman holding survives the  
8 | Supreme Court's decision in INS v. Ventura, 537 U.S. 12, 16 (2002),<sup>5</sup>  
9 | the Harman holding does not direct reversal of the present case.  
10 | Here, the ALJ must recontact Dr. Pitchon concerning "outstanding  
11 | issues that must be resolved before a determination of disability can  
12 | be made." Further, it is not clear from the record that the ALJ  
13 | would be required to find Plaintiff disabled for the entire claimed  
14 | period of disability were the opinion of Dr. Pitchon credited.

15 | ///

16 | ///

17 | ///

18 | ///

19 | ///

20 | ///

21 | ///

22 | ///

23 | ///

24 | ///

---

25 |  
26 |  
27 | <sup>5</sup> The Ninth Circuit has continued to apply Harman, despite  
28 | INS v. Ventura. See Benecke v. Barnhart, 379 F.3d 587, 595 (9th  
Cir. 2004).

**RECOMMENDATION**

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) denying Plaintiff's and Defendant's motions for summary judgment; and (3) directing that the matter be remanded to the Commissioner of Social Security Administration for further administrative action.

DATED: July 9, 2007.

\_\_\_\_\_/s/\_\_\_\_\_  
CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE

1 **NOTICE**

2       Reports and Recommendations are not appealable to the Court of  
3 Appeals, but may be subject to the right of any party to file  
4 objections as provided in the Local Rules Governing the Duties of  
5 Magistrate Judges and review by the District Judge whose initials  
6 appear in the docket number. No notice of appeal pursuant to the  
7 Federal Rules of Appellate Procedure should be filed until entry of  
8 the judgment of the District Court.